RECEIVED
MAY 11 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CASE NO. 80-1627

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF FLORIDA,

Petitioner,

v.

VINCENT ANTHONY BUSCH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
FIRST DISTRICT COURT OF APPEAL OF FLORIDA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW	1
REASONS WHY THE PETITION SHOULD NOT BE GRANTED	1
CONCLUSION	6

TABLE OF AUTHORITIES

CASES:

Abood v. Detroit Board of Education, 431 U.S. 209, reh. den. 433 U.S. 915 (1977)	2
Almeida-Sanchez v. United States, 413 U.S. 266 (1973)	5
Banks v. California, 395 U.S. 708 (1969)	3
Bowen v. United States, 422 U.S. 916 (1975)	5
Busch v. State, 392 So.2d 272 (Fla. 1st DCA 1980)	2
California v. Green, 399 U.S. 149 (1970)	3
Coolidge v. New Hampshire, 403 U.S. 443 (1971)	5
Gerstein v. Pugh, 420 U.S. 103 (1975)	5
Hankerson v. North Carolina, 432 U.S. 233 (1977)	5
Jones v. United States, 357 U.S. 493 (1958)	5
Linkletter v. Walker, 381 U.S. 618 (1965)	4
Mancusi v. DeForte, 392 U.S. 364 (1968)	4
North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973)	2
Payton v. New York, 445 U.S. 573 (1980)	passim
State v. Perez, 277 So.2d 778 (Fla. 1973)	5
State v. Santamaria, 385 So.2d 1130 (Fla. 1st DCA 1980), rev. den. 392 So.2d 1380 (Fla. 1980)	3
United States v. Peltier, 422 U.S. 531 (1975)	5
United States v. Santana, 427 U.S. 38 (1975)	5
United States v. Watson, 423 U.S. 411 (1976)	5

OTHER:

Fourth Amendment, United States Constitution	1,4,5
28 USC §1257(3)	2,3

CASE NO. 80-1627

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF FLORIDA, :

Petitioner, :

v. :

VINCENT ANTHONY BUSCH, :

Respondent. :

:

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE FIRST DISTRICT COURT OF APPEAL OF FLORIDA

QUESTION PRESENTED FOR REVIEW (AS RESTATED BY RESPONDENT):

WHETHER THE FIRST DISTRICT COURT OF APPEAL OF FLORIDA ERRED IN RETROACTIVELY APPLYING THIS COURT'S DECISION IN PAYTON V. NEW YORK, 445 U.S. 573, (1980) TO THE INSTANT CASE WHERE THE INSTANT CASE WAS NOT FINAL AT THE TIME OF THE PAYTON DECISION.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED:

Respondent believes this Court should decline to grant the State of Florida's petition for a writ of certiorari for three reasons: (1) the state has failed to show proper jurisdiction before this Court; (2) the decision of the Florida Court to apply Payton v. New York, 445 U.S. 573 (1980) retroactively to the instant case was sound because the instant case was not yet final at the time of the Payton decision; and (3) this Court's Payton decision was not such a departure from established law under the Fourth Amendment to the United States Constitution as to preclude retroactive application for public policy reasons.

The certiorari jurisdiction of this Court is narrowly defined by 28 USC §1257(3), and requires a final judgment. The opinion of the First District Court of Appeal of Florida is not a "final judgment" because that opinion remanded this

cause to the trial court for further evidentiary hearings into two issues concerning respondent's arrest and subsequent confession:

> The key factor is that the officers were admitted to the home by another person. The record contains conflict and is unclear as to whether the admittance was consensual. Therefore, we remand to the trial court for further hearing on the question of whether or not the admittance of the officers was consensual. If the admittance was consensual, appellant's conviction will stand because the holding in Payton would not apply, the arrest would be deemed legal and the subsequent confession would be admissible, the court having already found that it was freely and voluntarily given.

Busch v. State, 392 So.2d 272, 273 (Fla. 1st DCA 1980).

The Florida First District Court of Appeal also remanded to the trial court for an evidentiary hearing on the confession issue:

> The circumstances surrounding Busch's confession are not so clearly set forth in the record that we can make a determination as to whether or not the confession was given so freely and voluntarily as to purge the primary taint of the unlawful arrest. Therefore, contingent upon the trial court's finding on the entry question, further proceedings should be had below to determine whether or not the facts surrounding the confession satisfy the Wong Sun[v. United States, 371 U.S. 471 (1963)] requirements.

Id. at 274.

This Court sometimes will review a judgment of a state appellate court which reverses a trial court and remands to the trial court, but only where that remand is for a ministerial purpose. Abood v. Detroit Board of Education, 431 U.S. 209, reh. den. 433 U.S. 915 (1977); North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973). The reasons for requiring a final decision of a state court prior to Supreme Court review were stated in the latter case as follows:

> The finality requirement of 28 USC §1257 which limits our review of state court judgments, serves several ends: (1) it avoids peacemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Art. III; (3) it limits federal review of state court determinations

> of federal constitutional issues to leave at a minimum federal intrusion in state affairs.

Id. 414 U.S. at 159. See also California v. Green, 399 U.S. 149, 169-70 (1970) in which this Court held, regarding a question as to whether the admission into evidence of preliminary hearing testimony violated a defendant's right to cross-examine witnesses:

> Its resolution depends much upon the unique facts in this record, and we are reluctant to proceed without the state court's views of what the record actually discloses relevant to this particular issue.

Nor has petitioner demonstrated that it had no further relief available in the Florida Supreme Court. The jurisdiction of this Court cannot be invoked under 28 USC §1257(3) where the petitioner has failed to seek review in the state's highest court. Banks v. California, 395 U.S. 708 (1969). Certainly petitioner knows that discretionary review of the First District's opinion may have been sought in the Florida Supreme Court, as petitioner had sought such review on the same point of law in State v. Santamaria, 385 So.2d 1130 (Fla. 1st DCA 1980), rev. den. 392 So.2d 1380 (Fla. 1980). If the State of Florida wished to present the issue of the retroactivity of Payton v. New York, supra, to this Court it should have done so in State v. Santamaria, which has been before the Supreme Court of Florida. It should not seek a truly advisory opinion from this Court on a case which is not yet ripe for a decision, and which has not been reviewed by the highest state court.

Certiorari should also be denied because the First District of Florida was entirely correct in granting relief to Respondent in light of this Court's decision in Payton v. New York, supra. A casual reading of the State of Florida's petition might lead one to believe that this Court has never permitted a state court to give retroactive effect to its Fourth Amendment decisions. That is simply not true. This Court has differentiated between state court decisions which were "final" at the time an alleged new rule of law is

announced, and those which were not "final", applying the alleged new rule of law retroactively in the latter but not in the former. Linkletter v. Walker, 381 U.S. 618 (1965); Mancusi v. DeForte, 392 U.S. 364 (1968). The definition of "final" has been stated as follows:

> By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for a petition for a certiorari had elasped before our decision in Mapp v. Ohio, [367 U.S. 643 (1961)]

Linkletter v. Walker, 381 U.S. at 622, note five. Respondent was pending before this Court in Case No. 78-5403 at the time Payton v. New York, was decided. To deny retroactive effect to a case which is pending in this Court at the same time another case is favorably decided would be to decide issues of constitutional law as applied to a particular party on the basis of a lottery.

Petitioner makes much of the fact that the First District Court of Appeal of Florida may have assumed that this Court's order of April 21, 1980 in Case No. 78-5403 required retroactive application of Payton v. New York. Whatever truth there may be to this interpretation is of no importance, because the foregoing argument and the following argument both support the First District's proper retroactive application of Payton, and therefore the denial of certiorari. Hankerson v. North Carolina, 432 U.S. 233, 240 (1977) (note six).

Certiorari should also be denied because this Court in Payton v. New York announced no new rule of law, contrary to petitioner's assertions. If the purpose of the exclusionary rule of the Fourth Amendment is not to penalize the police for a good faith reliance upon prior decisions of this Court, such a rationale is not applicable here because this Court had never addressed the issue of routine warrantless arrests in the home absent exigent circumstances. To the contrary, this Court had expressed considerable skepticism regarding such arrests in its recent prior decisions. See, e.g., Jones v. United States, 357 U.S. 493, 499 (1958); Coolidge v. New Hampshire, 403 U.S. 443, 480 (1971 (Stewart, J.); Gerstein v. Pugh, 420

U.S. 103, 113 (1975)(note thirteen); United States v. Watson, 423 U.S. 411, 418 (1976)(note six); United States v. Santana, 427 U.S. 38, 42 (1976)(majority opinion). Furthermore, as this Court noted in parts III B and C of its Payton opinion, the trend among the states in recent years was to hold warrantless arrests in the home unconstitutional, with only Florida and New York resisting. Payton v. New York 445 U.S. at 575.

Thus, petitioner may take no solace in the fact that the Florida Supreme Court in State v. Perez, 277 So.2d 778 (Fla. 1973) misconstrued the clear harbinger of this Court's prior decisions, disregarded the nation-wide trend of authority, and ignored the obvious meaning of the Fourth Amendment itself. After all, if law enforcement's reliance is upon a state court decision which interprets the federal constitution, such reliance is misplaced, as this Court is the final arbiter of federal constitutional law.

Petitioner seeks to equate the state law enforecement officials in the instant case with the federal border patrol in Bowen v. United States, 422 U.S. 916 (1975) and United States v. Peltier, 422 U.S. 531 (1975). But the key difference is that in those cases this Court denied retroactive application of Almeida-Sanchez v. United States, 413 U.S. 266 (1973) as a matter of public policy because the federal border patrol agents were acting in reliance upon federal statutes and federal lower court decisions. Here the police were ignoring the clear importance of this Court's decisions on the Fourth Amendment and relying solely upon the unfortunate opinion of the Florida Supreme Court in State v. Perez, supra. Thus, the granting of retroactive effect to Payton v. New York, in the instant case by a Florida court is not contrary to public policy where the state formerly chose to "disregard the overriding respect of the sanctity of the home that has been embedded in our traditions since the origins of the Republic." Payton v. New York, 445 U.S. at 601. Therefore certiorari should be denied.

CONCLUSION

Respondent submits that the decision of the First District Court of Appeal of Florida is not yet ripe for review by this Court. Respondent further submits that the lower court properly applied Payton v. New York to the instant case. There is no need for this Court to exercise its discretionary jurisdiction.

Respectfully submitted,

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been hand delivered to the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida; and a copy mailed to Mr. Vincent Anthony Busch, 454 East Sixth Street, Jacksonville, Florida, 32206, this 7 day of May, 1981. All parties required to be served have been served.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER

RECEIVED
MAY 1 1 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CASE NO. 80-1627

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF FLORIDA, :

Petitioner, :

v. :

VINCENT ANTHONY BUSCH, :

Respondent. :

_____ :

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

VINCENT ANTHONY BUSCH, respondent in the above-styled cause, hereby moves this Court, by his undersigned counsel, for leave to proceed in forma pauperis and in support hereof shows as follows:

1. An affidavit signed by respondent has been filed, with the brief in opposition to the petition, wherein respondent sets forth the fact that he is indigent and unable to pay or give security for the fees and costs attendant to this proceeding.

2. Respondent was adjudged insolvent for the purpose of appeal in the District Court of Appeal of Florida and was represented there by appointed counsel. Upon review of this conviction respondent has appeared in this Court in forma pauperis in No. 78-5403.

WHEREFORE, it is respectfully requested that respondent be permitted to proceed in forma pauperis in this matter.

Respectfully submitted,

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904)488-2458

Counsel for Respondent

CERTIFIFCATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Leave to Proceed in Forma Pauperis as well as the attached Affidavit in Support of Motion for Leave to Proceed in Forma Pauperis, have been hand delivered to Mr. Ray Marky, Assistant Attorney General, The Capitol, Tallahassee, Florida, and copies have been mailed to the respondent, Mr. Vincent Anthony Busch, 434 East 6th Street, Jacksonville, Florida, 32206, this 7 day of May, 1981. I further certify that all parties necessary to be served have been served.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER

RECEIVED
MAY 1 1 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 80-1627

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF FLORIDA,

Petitioner,

vs.

VINCENT ANTHONY BUSCH,

Respondent.

I, VINCENT ANTHONY BUSCH, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the respondent in the above entitled case.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am on parole.

3. I am unable to give security for said cause.

4. I believe that I am entitled to respond to the State of Florida's petition.

Vincent Anthony Busch
VINCENT ANTHONY BUSCH

STATE OF FLORIDA

COUNTY OF DUVAL

The foregoing affidavit of Vincent Anthony Busch was subscribed and sworn to before me this 13th day of ~~March~~ April, 1981.

Richard E. Miller
NOTARY PUBLIC, STATE OF FLORIDA

MY COMMISSION EXPIRES:
Notary Public, State of Florida at Large
My commission expires Sept. 10, 1983
Bonded by Transamerica Insurance Co.